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No. 972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

JULIUS BRUNER AND WIFE IRIS BRUNER,
Petitioners

v.

THE STATE OF TEXAS, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Texas

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

JULIUS BRUNER AND WIFE IRIS BRUNER,
Petitioners

v.

THE STATE OF TEXAS, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Texas

PRAYER OF PETITIONERS

Now come Julius Bruner and wife, Iris Bruner, Petitioners, and pray that the Supreme Court of the United States grant this their Petition for Writ of Certiorari to the Supreme Court of Texas.

OPINIONS BELOW

The only opinion rendered in this cause is by the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, dated May 7, 1965. This opinion is reported in 391 S.W. 2d 149 (Tex. Civ. App. 1965, n.r.e.), and is reprinted in this Petition as Appendix A.

STATEMENT OF JURISDICTION

The decree sought to be reviewed is the order by the Supreme Court of Texas entered on November 3,

1965, overruling Petitioners' Motion for Rehearing. This motion was filed within the time permitted by Texas law after the Supreme Court of Texas on October 6, 1965, refused Petitioners' Application for Writ of Error, No Reversible Error. However, the Supreme Court of Texas did not write any opinion in either order. Thus, the Supreme Court of Texas left in full force and effect the judgment contained in the May 7, 1965 opinion by the Fort Worth Court of Civil Appeals. Therefore the decree by the Texas Court of Civil Appeals is also brought to this Court for review, since it was unchanged by subsequent orders by the Supreme Court of Texas. The November 3, 1965, order by the Texas Supreme Court overruling Petitioners' Motion for Rehearing is the final state judgment rendered and obtainable.

STATUTE CONFERRING JURISDICTION

Title 28, U.S.C. §1257, states in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of . . . the United States.

QUESTIONS PRESENTED FOR REVIEW

1. Can a State force the Defendant in a condemnation case to prove that his evidence is admissable beyond a reasonable doubt before he can present it to the jury?

2. Does any adequate State ground exist to justify giving the State courts any power to exclude admissible evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the United States Constitution provides, in pertinent part: ". . . nor shall private property be taken for public use, without just compensation."

Amendment XIV to the United States Constitution provides, in pertinent part: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law;"

STATEMENT OF THE CASE

At the trial of this eminent domain case in the County Court at Law of Tarrant County, Texas, attorneys for both the condemnor, the State of Texas, and the defendants, Petitioners herein, stipulated that the sole issue was the market value of the condemned property (S.F. 3). The 33.881 acres of Petitioners' property condemned by the State is located near an industrial area in North Fort Worth, and is immediately to the north of the Fort Worth city limits. Some of the industries near the condemned property are designated by capital letters on the map in Appendix F. The condemned property is designated by the green "crosshatching". The tracts of land designated by Arabic numbers indicate sales of comparable property offered by Petitioners in an effort to substantiate their experts' opinions of the market value of the condemned

property. All of these offered sales were excluded from evidence by the trial court.

The first real estate expert offered by Petitioners was L. G. (Glen) Key, regional Land and Tax Commissioner for the Fort Worth and Denver Railroad. The trial court found that he was not an expert, and therefore, was not qualified to express an opinion as to the value of the condemned property (S.F. 131). Key would have told the jury that the condemned property was worth $2,500.00 per acre, a total of about $74,500.00 (S.F. 115). The Texas Court of Civil Appeals correctly found that Mr. Key was an expert and should have been permitted to give his opinion, but held that the trial court's error was not reversible error. M. R. Carb, Jr., was the second real estate expert offered by Petitioners. He was correctly held by the trial court to be a real estate expert qualified to express his professional opinion as to the market value of the condemned property. He testified that the property had a value of $65,000.00, or about $1,923.00 per acre (S.F. 153). The trial court excluded all of the sales of property comparable to the condemned property which both experts offered into evidence.

Petitioners' third expert, Bill Wade, was recovering from pneumonia at the time of trial. He was permitted to state his expert value opinion, slightly over $65,000.00, but was not asked about any sales of comparable property in order to shorten his testimony (S.F. 312, 317).

Thus, Petitioners were permitted to show the jury

only bare unsubstantiated opinions of the market value of their condemned property.

By contrast, the State's expert was permitted to testify about two sales of property which he considered comparable to the condemned property (S.F. 256, 261). The State's two comparable sales, for $800 and $1,000.00 per acre, were located two to three miles north of the condemned property (S.F. 289), and are designated in Appendix F by Roman numerals "I" and "II". Some of the sales offered by Petitioners were less than one-half mile from the condemned property. Since the jury saw the value of other land located two to three miles away, and since the condemned property is much closer to a developing industrial area, Petitioners contend that the jury could well have based their market value verdict for the condemned property, $40,000.00, or about $1,-179.00 per acre (Tr. 20), solely on the testimony from the State's witnesses. Petitioners contend that the jury probably gave no weight at all to the unsubstantiated market value opinions they were permitted to hear from Petitioners' experts.

A more detailed description of Petitioners' offered sales of comparable property is found in Appendix E.

The federal questions sought to be reviewed were first raised by Petitioners in Point of Error I in their Motion for Rehearing filed in the Texas Court of Civil Appeals on May 19, 1965. This was the first opportunity Petitioners had to raise such questions. A copy of this Motion is reprinted in Appendix B, and is found in the record. The federal questions

presented here were also raised by Petitioners in Point of Error No. I in their Application for Writ of Error filed in the Supreme Court of Texas, reprinted here as Appendix C. At no time were Petitioners' federal questions passed on by any state court, other than by the overruling of their Motion for Rehearing by the Court of Civil Appeals, by the refusal of their Application for Writ of Error by the Supreme Court of Texas, and by the overruling of their Motion for Rehearing by the Supreme Court of Texas. Petitioners' Motion for Rehearing filed in the Texas Supreme Court, also raising the federal questions presented here, is contained in this petition as Appendix D.

SUMMARY OF ARGUMENT

In this Texas condemnation proceeding, Petitioners felt the full brunt of the Texas rule that the trial court has a certain area of unlimited discretion to exclude evidence offered by the condemnees. The trial court exercised its discretion by excluding all testimony offered by Petitioners' expert witnesses concerning the sales of comparable property which they used in forming their opinion as to the value of Petitioners' condemned property. The Texas appellate courts held that such evidence was admissible, but that the trial court was within its discretion in excluding it. Petitioners were deprived of their best evidence showing the value of their condemned property.

The effect of this ruling is to place the oppressive

burden on the condemnee defendants of having to prove that their offered sales of comparable property are admissible beyond a reasonable doubt before they can present them to the jury. Such a burden is intolerable because it impairs the right to just compensation guaranteed by the Fifth Amendment, and violates the due process clause of the Fourteenth Amendment. No state ground can possibly exist to justify giving a state trial court any power at all to exclude admissible evidence, especially when the exclusion may impair the Constitutional rights of the litigant who offered it.

STATEMENT OF REASONS FOR GRANTING THE WRIT

I. In our system of Constitutional values, the right of a landowner to receive just compensation for his condemned property is a right of as transcending value as is the right of a criminal defendant to his liberty.

A. *The Fifth and Fourteenth Amendments protect the position of a Defendant in an eminent domain proceeding just as strongly as they protect a Defendant in a criminal proceeding.*

Long before this Court began to hold that certain provisions of the Bill of Rights guaranteeing individual civil rights were incorporated by the Fourteenth Amendment, it held that the Fifth Amendment's guarantee to the landowner that he must receive just compensation for his condemned property applies to the states through the Fourteenth Amendment. *Chi-*

cago B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897). Cf. *Mallory v. Hogan*, 378 U.S. 1, 4 (1964). The Constitution requires that the property right of just compensation be preserved with fervor equal to that displayed in protecting individual civil rights.

Petitioners urge the Court to be aware of the fact that a Defendant landowner in an eminent domain trial has the full weight of the state against him and his property in the same manner as a Defendant in a criminal case. Both the rights of the criminal defendant and the condemnation defendant are protected by the Fifth Amendment. Yet who can imagine this Court's permitting the resolution of a reasonable doubt as to a fact question in a criminal case in favor of the state in the same way that the Texas discretionary rule permits it to be decided against the defendant landowner?

A trial judge who feels that his duty as an elected state official is to save the state money will naturally be inclined to decide close questions of admissability in favor of the state. The fact that a similar bias may be exercised by a different judge in favor of the landowner is immaterial. The Fifth Amendment does not guarantee the government the raw power to pay the cheapest possible price when it condemns private property for public use.

In a criminal case, the tryer of fact must decide in favor of the defendant unless he is convinced otherwise beyond a reasonable doubt. Cf. *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). In a condemnation proceeding, the landowner is an innocent defendant.

Through no act of his own, the progress of society requires him to give up his property for the benefit of everyone. He should be entitled to procedural protections which weigh reasonable doubts in his favor, not the state's. The danger of hastily and unfairly taking one's private property for public use without just compensation should be faced with the seriousness which the Fifth Amendment commands, instead of being treated as a mere state common law evidence matter.

B. *Whether the Texas courts failed to give proper recognition to the Constitutional right to just compensation is a question upon which Defendant Petitioners are entitled to invoke the jurisdiction of the United States Supreme Court.*

The jurisdiction of this Court is not affected merely because the existence of Petitioner's Constitutional right to just compensation depends partially on a state rule of evidence. Cf. *Fox River Paper Co. v Railroad Commission*, 274 U.S. 651, 653-54 (1927). As will be shown below, the Texas rule giving the trial court an exclusive authority to exclude evidence not admissible beyond a reasonable doubt is a strong procedural bar to the assertion of their federal right to just compensation. This Court has consistently held that the "adequacy of state procedural bars to the assertion of federal questions is itself a federal question. See *Wright v. Georgia*, 373 U.S. 284, 289-291, 10 L ed 2d 349, 354, 83 S Ct. 1240" *Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

"Whatever springes the state may set for those who

are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis v. Wechsler*, 263 U.S. 22, 24 (1923). It is within the province of this Court "to inquire not only whether the right was denied in expressed terms, but also whether it was denied in substance and effect as by putting forward non-federal grounds of decision that were without any fair or substantial support . . ." *Ward v. Love County*, 253 U.S. 17, 22 (1920), quoted in *Staub v. Baxley*, 355 U.S. 313, 319 (1958).

II. The Texas Rule of Evidence giving the Trial Court an uncurtailed area of discretion to exclude evidence offered by the Defendant landowner places an unconstitutionally heavy burden of proof upon the condemnees.

A. *The Texas evidentiary rule relating to comparable sales requires Petitioners to prove their case as to market value beyond a reasonable doubt, and places a lesser burden on the State.*

In order to present their comparable sales to the jury, Defendant Petitioners were required first to prove to the Trial Court that their offered evidence was admissible beyond a reasonable doubt. This burden can be easily seen in the language of the opinion presented for review:

> A discretion is lodged in the trial court relative to whether evidence tendered purporting to show sales of comparable property to that condemned

> shall or shall not be admitted . . . Within such area it is the trial court's exclusive discretion to rule upon whether the evidence tendered shall or shall not be admitted where an appellate court should not disturb the decision trial court rendered regardless of whether the appellate judges believe it would have been proper to have ruled in a manner other than the trial court did rule. *Within such area the trial court could not be held to have abused his discretion whichever way he might rule. We are of the opinion that condemnees' tendered evidence relative to comparable property sales fell within such area.* That being true we hold that no reversible error resulted because of its exclusion. [*Bruner v. State*, 391 S.W. 2d 149, 155 (Tex. Civ. App. 1965, n.r.e.), emphasis added. Reprinted in Appendix A at pp. 8-9.]

Petitioners are unable to find any Texas cases clearly defining the term "abuse of discretion." The best description found is *Hays v. State*, 342 S.W. 2d 167, 171 (Tex. Civ. App. 1960, n.r.e.), quoting from *Southland Life Ins. Co. v. Egan*, 126 Tex. 160, 86 S.W. 2d 722, 723 (Tex. Comm. App. 1935, opin. adopted):

> The trial court's discretion is not unlimited and does not extend to the erroneous application of the law to undisputed facts.***Differently stated, the trial court abuses its discretion when it fails or refuses to apply the law to conceded or undisputed facts.

Thus, in questions whether the trial court has abused its discretion in excluding evidence, it appears that in Texas law, the question of "abuse of discretion"

is a question of whether the evidence is admissible as a matter of law, or beyond a reasonable doubt.

The Texas courts have ruled that Petitioners must tender evidence which is admissible beyond a reasonable doubt in order to present it to the jury. Such a rule makes a mockery of the dominant rule that Petitioners need only prove their case by a preponderance of the evidence, and damages, if not destroys, their opportunity to show the amount of compensation guaranteed them by the Fifth Amendment. And, as will be further argued below, such an oppressive burden also violates the standards of adequacy required by the due process clause of the Fourteenth Amendment.

Testimony showing sales of comparable property is the best evidence of the condemned property's market value; it is the evidence most easily understood by the jury. *State v. Morse*, 342 S.W. 2d 165, 167 (Tex. Civ. App. 1960, n.r.e.) The Constitutional importance of an accurate judgment concerning market value requires that any reasonable doubt as to admissibility of sales of comparable property offered by the landowner be resolved in his favor, not in the state's.

B. *The question of whether a procedural rule influencing burden of proof is Constitutionally permissible is a Federal question when a Federal right is involved.*

"In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome." "And the more important the rights at stake the more important must be the procedural safe-

guards surrounding those rights. Cf. *Powell v. Alabama*, 287 U.S. 45, 71, 77 L ed 158, 171, 53 S Ct 55 . . ." *Speiser v. Randall* 357 U.S. 513 at 525 and 520 (1958). The Constitution protects litigants in civil as well as in criminal cases. *Western & Atlantic R. Co. v. Henderson* 279 U.S. 639 (1929), cited in *Speiser v. Randall*, supra, 357 U.S. at 524. A state procedural rule must be invalidated if it places an unduly onerous burden on a person trying to establish a Federal right. *Brown v. Western Ry.*, 338 U.S. 294, 296 (1949). Contrast Hill, *The Inadequate State Ground*, 65 Colum. L. Rev. 943, 975 (June 1965) (to whom Petitioners express their indebtedness for his comprehensive analysis, even though they disagree with some of it.) The Texas rule throws a burden of proof on Petitioners which narrows their protection under the Fifth Amendment, and thus contravenes the Constitution. Cf. *American Railway Express Co. v. Levee*, 263 U.S. 19, 21 (1923) and *Boyd v. Nebraska, ex. rel. Thayer*, 143 U.S. 135 (1892).

In permitting the trial court his unlimited discretion to exclude from evidence all of Petitioners offered sales of comparable property because they were not admissible beyond a reasonable doubt, the Texas appellate courts upheld rulings which confined Petitioners' witnesses to bare unsubstantiated statements of opinion as to market value. The Texas courts never permitted Petitioners to present fairly their case to the jury. The Texas rule annihilated the heart of their case under the guise of judicial discretion.

III. A State rule giving the Trial Court an uncurtailed area of discretion to exclude evidence offered by Defendant condemnees trying to protect their Constitutional rights is a grievously wrong rule because no independent, adequate, fair, and substantial basis exists for it.

A. *The right to just compensation is a constitutional obligation imposed upon state courts by the United States Constitution which may not be evaded by reliance on an inadequate state ground.*

The fact that the Texas evidentiary rule permitted trial courts an unlimited area of discretion to exclude evidence of comparable sales does not preclude review by this Court. There must exist some substantial, independent, and fair state ground supporting the exclusionary rule before it can stand as a barrier to federal rights. *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 42 (1944); see also *Broad River Power Co. v. South Carolina*, 281 U.S. 537, 540-41 (1930), and cases there cited.

B. *No ground based on logic, or even expediency, exists for a rule permitting uncurtailed trial court discretion to exclude sales of comparable property.*

1. Discretion relates to the person, not to the facts.

As petitioners argued in their motion for rehearing filed in the Texas Court of Civil Appeals, trial court discretion is a rule designed for such necessities as achieving the most accurate possible on-the-spot evalu-

ation of the credibility of witnesses. This rule has no applicability whatsoever to objective facts which are equally as obvious to the appellate courts as they are to the trial courts. The holding of the Texas courts that the trial judge in eminent domain proceedings has a certain area of unlimited discretion in passing on the admissibility of facts is well-founded in precedent. However, none of this precedent can be sustained by reason, because no logical argument, or argument based on expediency, can justify giving the trial judge such discretion when it does not involve personal judgments best determined on the spot, such as credibility of witnesses and contempt of court.

Facts stated by expert witnesses do not involve the character or credibility of the expert. The court already had held that the witness was a qualified expert. The trial judge, as in this case, is not judging the expert; he is weighing the facts. The fact that the trial judge hears them first does not give him any advantage over an appellate court which has equal access to the facts. It is the facts which are in question, not the person stating them.

2. Discretion used to exclude evidence is much more drastic in result than discretion used to admit it.

The Texas Court of Civil Appeals held that the trial court could not err whether it admitted or excluded the evidence. See p. 11, supra. Thus, the excluded evidence was admissible. There is a drastic difference between the results to condemnees when the trial court exercises its discretion to admit evidence from when it decides to exclude it. When the

trial court exercises its discretion to *admit admissible evidence* in close cases, the state still has available at least three corrective adversary techniques to offset the impact of the admitted evidence: (1) cross-examination of the expert, (2) request for limited instructions, and (3) argument to the jury.

By contrast, when the trial court exercises its discretion to *exclude admissible evidence* of comparable sales offered by the landowner, the landowner is left with no remedy at all. He has absolutely no opportunity for corrective action at the trial, for the trial court, in effect, has excluded the evidence the same as if it were inadmissible beyond a reasonable doubt. All that the landowner can do is perfect his record for appeal and hope to show that the tendered comparable sale is comparable without a reasonable doubt. He has this heavy burden in spite of the fact that it is his constitutional rights which the trial is supposedly guaranteeing, and in spite of the fact that adequate protection exists for the state if the evidence is admitted. The Fifth Amendment's guarantee of the right to just compensation, and the due-process clause of the Fourteenth Amendment are meaningless, pious utterances if so harsh a burden is placed on the landowner for so inferior a reason.

3. A witness held to be an expert must also be held sufficiently expert to state the basis of his expert opinion.

Note that the Court of Civil Appeals held that both petitioners' witnesses, M. R. Carb, Jr., and Glen Key, were real estate experts qualified to express their

opinion as to the market value of the condemned property. Even the trial court held that Carb was such an expert, and permitted him to express his market-value opinion, which was $65,000.00 (S.F. 153). The Court of Civil Appeals also ruled that the trial court properly excluded all comparable sale testimony affected by both experts. The jury found the value to be only $40,000.00. The excluded testimony came from expert real estate appraisers. To hold that such a witness is sufficiently expert to have an opinion, but not sufficiently expert to know what his own opinion is based on, is an absurdity. It is as absurd — and as disastrous — as holding that the criminal accused's psychiatrist can state that the accused was insane, and not allowing him to explain why.

In view of the crucial importance of sales of comparable property supporting the expert's opinion, Petitioners submit that the trial court cannot give the appearance of fairness by permitting the expert to state his opinion, while at the same time completely undermining that opinion by excluding vital supporting testimony. Mere value opinions are impotent. When the trial court excludes the real estate expert's comparable sales, it emasculates his opinion as to market value.

When the expert says in court that he used sales of comparable property in forming his opinion as to the value of the condemned property, he should be allowed to testify unless some compelling reason exists otherwise. Market value has been equated with

just compensation in Texas law. If the expert stakes his professional reputation in the market place on sales which he considers to be comparable, he must be allowed to stake his reputation on them in the courtroom also. By not permitting the expert to testify as to comparable sales unless he satisfies the trial court that they are admissible beyond a reasonable doubt, the Texas Courts have adopted the form of the market place, but not its substance, and they have done so without any valid reason.

CONCLUSION

For the reasons stated, and in the interest of all landowners who are deprived against their will of their private property for public use, Petitioners submit that the opinions and orders of the Texas Supreme Court and Texas Court of Civil Appeals in this cause should be reversed, and the cause remanded for trial with instructions to admit into evidence the sales of comparable property offered by Petitioners.

Respectfully submitted,

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By Heard L. Floore
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CERTIFICATE

I, the undersigned attorney of record for Petitioners in this cause, a member of the Bar of this Court, hereby certify that a copy of this Petition for Writ of Certiorari has heretofore on this the 31st day of January, 1966, been deposited in the United States Mail, with first class postage prepaid, addressed to Waggoner Carr, Attorney General of Texas, and Hawthorne Phillips, T. B. Wright, Carroll R. Graham, William R. Hemphill, F. William Colburn and Fred M. Talkington, Assistant Attorneys General, P. O. Box 5075, West Austin Station, Austin, Texas, Attorneys for Respondent, the State of Texas.

Heard L. Floore

Heard L. Floore

APPENDIX A

No. 16634

IN THE COURT OF CIVIL APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS
Fort Worth, Texas

JULIUS BRUNER, ET UX, Appellants
vs.
THE STATE OF TEXAS, Appellee

FROM THE COUNTY COURT AT LAW
OF TARRANT COUNTY

OPINION (391 S.W. 2d 149)
May 7, 1965

Rehearing Denied June 11, 1965

Massey, Chief Justice

This is a condemnation case, from the judgment in which condemnees Julius Bruner and his wife appealed because of their dissatisfaction with the amount awarded for the property taken by condemnor for highway purposes. Involved is only the value of the property taken, there being no issue on dimunition of the value of the remainder of the condemnees' property.

Judgment affirmed.

The main questions presented on appeal consist

of complaints because of the exclusion of testimony. Among such was the testimony of the condemnees' expert witness L. G. Key as to his estimate of the value of the property taken. This exclusion was error, but not reversible error. Additional was evidence tendered by this and other witnesses concerning the amounts for which property, allegedly comparable, had been sold in the vicinity of that condemned. There were five sales of such property, according to condemnees' theory, and all were excluded. The trial court excluded evidence bearing upon the sale of one parcel, a 21 acre tract, on the theory that the evidence established a trade of lands rather than a sale or sales. The court excluded evidence bearing upon the sale of the other four parcels, as well as the 21 acre tract, because each of the five parcels had "railroad frontage", i.e., abutted directly upon existing railroad facilities or was very near to trackage. The condemned property was between one-quarter mile to one-half mile distant from existing trackage.

In addition, but coupled with the aforesaid complaint(s) and of concern if it becomes necessary in the test of whether the foregoing, as error, amounts to reversible error under the provisions of T. R. C. P. 434 (that is, that the exclusion of condemnees' evidence was reasonably calculated to cause and probably did cause the jury to return a verdict other than the verdict it did return had such evidence been admitted) is appellees' contention that the trial court was unduly liberal when he permitted the condemnor to introduce evidence showing amounts for which property, allegedly comparable, had been sold in the area near

the condemned property. Appellees claim that said property, two tracts sold severally and by different grantors, was not comparable to that condemned and hence the sales did not amount to comparable sales,—but that in any event, though it be conceded that evidence thereof was properly admitted, the reception of such evidence by the jury on a trial pursuant to which there had been excluded from their consideration the aforementioned proffered evidence of condemnees demonstrates that condemnees sustained such prejudice that the error claimed was reversible.

To aid in understanding the situation, we include for purposes of the opinion a map or plat, drawn to scale so that the location, shape and size of the aforementioned tracts of property may be visualized. [Petitioners' Note: Printed map omitted from opinion as reprinted here. See enlarged copy of same map in Appendix F.]

In the map or plat may be observed two tracts located in the north and northwest, the sales of which were received by the trial court upon tender of the condemnor as comparable sales. The other four tracts shown by the map or plat represent property, the sales of which were tendered as part of the evidence of condemnees. The fifth tract, heretofore mentioned, lies further south and is not shown. Shown is the location of the highway for purposes of which the condemnees' land was taken, being a freeway-type facility. The amount of land taken was 33.881 acres out of the 439 acre total belonging to condemnees.

Preliminary to discussion we desire to cite certain

language from the case of Hays v. State, 342 S.W. 2d 167, 170 (Dallas Civ. App., 1960, writ ref., n.r.e.), as follows: "Evidence of sales of comparable properties may be offered under three conditions: (I) on direct examination of expert or lay witnesses as independent substantive evidence of the value of the property to which the comparison relates, or (II) on direct examination of the value-witness to give an account of the factual basis upon which he founds his opinion on the issue of value of the real estate in controversy, or (III) on cross-examination of the value-witness to test his knowledge, experience and investigation and thus affect the weight to be given to his opinions."

In view of the majority opinion of the Supreme Court in State of Texas v. Oakley, 163 Tex. 463, 356 S.W. 2d 909 (1962), we believe that it is now established that in condemnation cases an expert value-witness, after having been qualified as such, is not to be so limited on direct examination that he cannot go into details of investigation and findings on the matter of comparable sales and testify as to what knowledge he acquired by way of hearsay concerning the prices paid as consideration therefor, but that he may do so provided such evidence is received for consideration by the jury with substantial safeguards against any misuse.

Even before such opinion by the Supreme Court, a value-witness was always permitted to give his opinion of the value of the property condemned, after he had been qualified as an expert, leaving any testimony in connection with matters taken into considera-

tion in arriving at the opinion value given, such as hearsay prices paid in comparable sales, etc., to be developed on cross-examination. This is the Condition III mentioned in the case of Hays v. State, supra.

In view of the Supreme Court's decision in Oakley, it would appear that such testimony may also be given under Condition II (in Hays v. State) and during the course of direct interrogation, provided there are substantial safeguards against any misuse or misconception on the part of the jury concerning the value of such testimony. In the Oakley case it was held that such substantial safeguard was afforded by the following instruction of the court to the jury: " 'You are instructed that testimony by witnesses not having first hand knowledge of the matter stated that certain properties had sold for certain prices shall not be considered as evidence that such properties have sold or that such properties have sold for the prices stated, or as evidence of the market value of the property involved, but may only be considered as being information which the witnesses testified they gathered for the purpose of forming an opinion of the market value of the property involved.' " What we have stated hereinabove relates to testimony as to prices of comparable property which the trial court permits. It would not have application to excluded testimony. Later in this opinion we will discuss the propriety of excluding such testimony upon the court's decision that the property sold is not sufficiently comparable to that condemned.

As applied to the tract shown by the map or plat

to be located in the southwest corner of condemnees' 439 acres an explanation is warranted. Its size is 21 acres. The land formerly belonged to condemnees. It was conveyed, as in six separate parcels, to grantees named in the instruments of conveyance. However, as shown by the evidence in condemnees' bill of exceptions, it amounted to a single sale from condemnees' standpoint. The railroad company, as owner of the trackage adjacent thereto, desired the land for development as industrial property. It agreed with condemnees on a valuation for purposes of their sale of the entire 21 acres, at $2,500.00 per acre. It was further agreed that condemnees would receive this price, per acre, from third persons. Reason therefor was that the railroad company owned property in other states or locations in this state which said third persons desired to buy, and for tax purposes there was an advantage to be realized in having said third persons pay the cash for the condemnees' land, but simultaneously to deliver title thereto to the railroad company in exchange for the latter's property they actually desired. This was done, condemnees receiving the agreed price for their land, but the record title thereto passing through the hands of said third persons and thence into the hands of the railroad company. Between the third persons and the railroad company the transaction was an even trade of properties, but as between the condemnees and the other persons it was a bona fide sale. If the property of the condemnees thereby transferred was comparable to the property condemned and under consideration in

the present instance it would constitute a comparable sale.

The nature of the proof relative thereto tendered by the condemnees in their bill of exceptions was such that it amounted to independent substantive evidence of the value of the 21 acres in that the testimony as to price received by the condemnees was from original parties. In other words the testimony was not hearsay, but was direct and independent substantive evidence. It therefore would be material and relevant to the ultimate issue to be determined, i.e., the value of the property taken in condemnation,—through additional satisfactory evidence to the effect that such property was comparable to the 21 acres. Appellees contend that such additional evidence was supplied. Unless the trial court was warranted in excluding it, under a proper judicial determination that the properties were not truly comparable, error would be apparent and reversibility would depend upon applicability of T. R. C. P. 434.

Such 21 acre tract and the other four tracts as to which the condemnees tendered evidence as comparable sales, or sales of comparable property, in support of the witnesses' stated opinion on the market value of the land condemned, were either adjacent or near-adjacent to existing railroad trackage. The condemned property was over a quarter of a mile removed therefrom. Part of it was at a considerably greater distance. Testimony from an agent of the railroad company, however, was to the effect that trackage would be made available to said portion of condemnees' total

acreage as and when it might be developed industrially. The same thing applied to all of condemnees' property. There was no issue made, but the evidence undisputably established that the highest and best use of all of the condemnees' property, including that taken, was for industrial development. As of the date condemnees' land was taken lack of convenient availability of water, sewer and gas hampered its development as such. It was shown that the condition will be remedied in the not too distant future. All the tracts as to which condemnees tendered evidence as comparable property either have some or all such utilities, or will probably have such at an earlier time than that condemned. It was established by the evidence that a considerable sum would be necessary to be expended in order to have such services extended to said area. All such as presently exist lie south of the nearest trackage.

A discretion is lodged in the trial court relative to whether evidence tendered purporting to show sales of comparable property to that condemned shall or shall not be admitted. Chaney v. Coleman, 77 Tex. 100, 13 S.W. 850 (1890); City of Austin v. Cannizzo, 153 Tex. 324, 267 S.W. 2d 808, 816 (1954); McCormick & Ray, Texas Law of Evidence, 2d Ed., p. 371, "Similar Acts and Transactions," § 1524, "Sales of Similar Property to Evidence Value", (1st Ed., p. 908, § 699); 118 A. L. R. 869 and 174 A. L. R. 386, Annotation: "Admissibility on issue of value of real property of evidence of sale price of other real property". In other words there is an area in which such character of evidence constitutes such that the judge

presiding over the trial court has the final decision upon the question of whether the subject matter of the sale or sales does or does not qualify as similar property to that condemned. Within such area it is the trial court's exclusive discretion to rule upon whether the evidence tendered shall or shall not be admitted where an appellate court should not disturb the decision the trial court rendered regardless of whether the appellate judges believe it would have been proper to have ruled in a manner other than the trial court did rule. Within such area the trial court could not be held to have abused his discretion whichever way he might rule. We are of the opinion that condemnees' tendered evidence relative to comparable property sales fell within such area. That being true we hold that no reversible error resulted because of its exclusion. In this connection see also 22 Tex. Jur. 2d, p. 422, "Eminent Domain", § 300, "—Comparison with sales of other land in vicinity". Rayburn, Tex. Law of Condemnation, p. 382, § 117, "Market Sales, Comparative Market Values".

Testimony tendered by the condemnees' witness L. G. Key included his opinion of the value of the property condemned. That opinion, independently proffered, as shown by a bill of exception, was not necessarily conditioned upon consideration of the price paid for other property on independent sales excluded by the trial court. This exclusion was error. Apparently it was inadvertently excluded as the result of some confusion. The witness was undoubtedly qualified to give his opinion. We have tested the prejudice to the condemnees resulting from the exclusion of

Mr. Key's opinion. In light of the whole record we have concluded that the effect of the exclusion was not such that it amounted to reversible error under the provisions of T. R. C. P. 434. Condemnee Bruner and two other expert witnesses for appellees testified as to value. As already noted, they were not allowed to testify concerning specific sales of property they considered comparable.

We have stated hereinabove that there is an area in which admissibility of evidence bearing upon sales of allegedly comparable property lies exclusively within the province of the trial court, i.e., an area where the appellate court would err should it assume the right to reverse the trial court's decision upon admissibility for it could not constitute an abuse of discretion. What was said in that connection would have full application to evidence upon allegedly comparable sales tendered on the trial by condemnor, and admitted by the trial court. These were sales of two tracts, those shown at the extreme top of the map or plat made a part of this opinion; that is to the north and northwest of the condemned property. Reception of such evidence would not be error.

As heretofore mentioned, it was not a matter of dispute between the parties as to the highest and best use of the condemned property, for it was established and not disputed that it should be developed as industrial property. Condemnee Julius Bruner tendered his own testimony to the effect that he purchased the property in 1948 with the purpose of so developing it. Such proffered evidence was excluded. Condemnees

could not have been prejudiced thereby and point of error complaining of the exclusion is overruled for this reason. Bruner's testimony to the effect of certain steps he had taken concerning plans for such development, including the expenditure of funds for surveys, mapping the property, etc., prior to the date the condemnor took the same was likewise excluded. The proffered testimony related to "paper planning" only, being wholly speculative even though professional engineering expense had been incurred incident thereto. The paper study and map of the engineers was also tendered. It was excluded. The condemnees had done nothing toward altering the surface or subsurface of the property, nor had any improvement been placed upon it pursuant to such plans. Had the matter of highest and best use of the condemned property been at issue the proffered evidence might have been admissible if the tender thereof had been limited to such purpose. Even so, "how the property might best be developed" was not a matter for the jury's consideration. Tender was not limited as to purpose anyway. The evidence was not relevant to a matter at issue between the parties. The trial court did not err in excluding it. Lower Nueces River Water Supply District v. Collins, 357 S.W. 2d 449, 452 (San Antonio Civ. App., 1962, writ ref., n.r.e.) and authorities cited.

The single special issue submitted to the jury inquired, as follows: "From a preponderance of the evidence what do you find was the market value of the strip of land condemned by the state for highway purposes at the time it was condemned, considered as severed land?" "Market value" was defined as "the

price the property will bring when offered for sale by one who desires to sell but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying."

The trial court's definition given the term "market value" is the Carpenter case definition. State v. Carpenter, 126 Tex. 604, 89 S.W. 2d 979 (1936). There was no complaint made of the definition given. Condemnees filed no objections to the court's charge. They did, however, tender a specially requested instruction, which was not given. It read: "You are further instructed that the term 'market value' as used herein means the price which the property would bring when it is offered for sale by one who desires, but is not obliged to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future." The requested definition is one suggested in certain circumstances in City of Austin v. Cannizzo, 153 Tex. 324, 267 S.W. 2d 808, 815 (1954), where the following language appears: "On the other hand, if it appears reasonably probable to the trial judge that the wants and needs of the particular community may result, within a reasonable time, in the lifting of restrictions, he should admit testimony of present value based on prospective use of the property for purposes not then available. Whenever such testimony is admitted it would not do violence to the definition of 'market value' suggested in the Carpenter case by adding thereto so as to have it read: (here is quoted a defini-

tion identical to that appellees requested)."

Even though we consider appellees' [*sic*] right to complain as not having been waived by a failure to object to the definition which was given, yet would we overrule their point of error which complains of the failure to give a definition like that suggested by Cannizzo. No case they have cited holds that it was error to give the definition suggested by the Carpenter case; all are cases where the definition suggested in Cannizzo was given and where the appellate courts rejected contentions of error because such was done. They do not constitute any authority for condemnees' contention that error existed in the refusal to give such definition.

Judgment is affirmed.

APPENDIX B

No. 16,634

IN THE COURT OF CIVIL APPEALS
FOR THE SECOND SUPREME JUDICIAL
DISTRICT OF TEXAS

JULIUS BRUNER, ET AL, Appellants
v.
STATE OF TEXAS, Appellee

APPELLANTS' MOTION FOR REHEARING
Filed May 19, 1965

TO THE HONORABLE COURT OF
CIVIL APPEALS:

NOW COME Julius Bruner and wife Iris Bruner, Appellants, who present their Motion for Rehearing in the above Cause, and move this Court to set aside its Judgment of May 7, 1965, affirming the Judgment of the Trial Court, because of the following errors which Appellants respectfully submit that the Court of Civil Appeals committed in its Opinion of May 7, 1965.

ASSIGNMENTS OF ERROR

I. In holding that the Trial Court has a certain area of unlimited discretion to exclude evidence in a condemnation case, the Court of Civil Appeals erred, in that such holding violates Defendant landowners' right to receive just compensation for their property taken by the State for a public purpose, as guaranteed

by the Fifth and Fourteenth Amendments to the United States Constitution, and by Article I, Sections 17 and 19 of the Texas Constitution.

II. The Court of Civil Appeals erred in holding that, once the Trial Court rules that a witness is a qualified real estate expert, the Trial Court has as much discretion in excluding his testimony showing the basis of his opinion as it does in admitting it.

III. The Court of Civil Appeals erred in holding, in effect, that a sale offered as a basis of expert value opinion must have the same high degree of comparability to the condemned property as a sale offered as independent direct evidence of market value.

IV. The Court of Civil Appeals erred in holding that the Trial Court did not abuse its discertion in excluding each of the sales offered by Appellants as sales of property comparable to the subject property, on the ground that none of them was sufficiently comparable to be admitted into evidence for any purpose.

V. The Court of Civil Appeals erred in holding that the Trial Court's excluding from evidence the expert value opinion of L. G. Key, although error, was not reversible error.

VI. The Court of Civil Appeals erred in finding that all of Appellants' offered sales had all or some necessary utilities, or the prospect of gaining them at an earlier time than did the condemned property, there being no evidence in the record to substantiate such finding.

VII. The Court of Civil Appeals erred in holding that the Trial Court properly excluded Appellant

Julius Bruner's testimony concerning his steps to develop the condemned property as a marketing, industrial and warehousing area.

VIII. The Court of Civil Appeals erred in finding no error in the Trial Court's refusing to submit to the Jury Appellants' following requested special issue in defining market value: "You are further instructed that the term 'market value' as used herein means the price which the property would bring when it is offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity of buying it, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future."

IX. The Court of Civil Appeals erred in finding no reversible error in the conduct of the Trial Court in admitting testimony, offered by Appellee's expert witnesses as independent direct evidence, concerning sales of property allegedly comparable to the subject property, when such testimony was objected to as hearsay because the witnesses were not parties to the transaction about which they testified.

ARGUMENT AND AUTHORITIES

I. (Restated) IN HOLDING THAT THE TRIAL COURT HAS A CERTAIN AREA OF UNLIMITED DISCRETION TO EXCLUDE EVIDENCE IN A CONDEMNATION CASE, THE COURT OF CIVIL APPEALS ERRED, IN THAT SUCH HOLDING VIOLATES DEFENDANT LANDOWNERS' RIGHT TO RECEIVE JUST COMPENSATION

FOR THEIR PROPERTY TAKEN BY THE STATE FOR A PUBLIC PURPOSE, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND BY ARTICLE I, SECTIONS 17 AND 19 OF THE TEXAS CONSTITUTION.

When this Court is deciding rules governing admisibility of comparable sales, it is not deciding mere common law evidence questions. It is deciding a constitutional right as precious to the Defendant Landowner as is the right against self-incrimination precious to the criminal defendant. The Fifth Amendment to the United States Constitution not only protects against self-incrimination; it also protects the individual against being deprived of his property for a public purpose without just compensation.

Whenever a reasonable doubt exists in the mind of a Trial Judge in a criminal case that a constitutional right, such as those guaranteed by the Fifth Amendment, is being violated, the Trial Judge has limited discretion to decide the question in favor of the Government. So, also, in an eminent domain trial; the Trial Judge, in protecting the constitutional right of the Defendant, must have only limited discretion whenever a reasonable doubt arises in his mind concerning an evidence ruling. Whenever a person is hauled into Court by the Government trying to deprive the person of his property for public use, the Landowner has the full weight of governmental power against him just as much as he would were he a Defendant in a criminal case. For this reason, the Fifth Amendment to

the United States Constitution wisely guarantees the right to the property owner to receive just compensation. The Constitution does not guarantee to the Government the raw power to take advantage of the Landowner through Trial Judge favors to the Government under the guise of judicial discretion.

Therefore, to implement the constitutional guarantees to a Defendant in an eminent domain proceeding, the Trial Judge must exercise his fact-finding power in the same way that a Jury must exercise its fact-finding power in a criminal case. In a criminal case, unless the evidence convinces beyond a reasonable doubt that the accused is guilty, he is innocent. Likewise, in an eminent domain case; unless the Landowner's proffered evidence is inadmissible beyond a reasonable doubt, it must be admitted.

II. (Restated) THE COURT OF CIVIL APPEALS ERRED IN HOLDING THAT, ONCE THE TRIAL COURT RULES THAT A WITNESS IS A QUALIFIED REAL ESTATE EXPERT, THE TRIAL COURT HAS AS MUCH DISCRETION IN EXCLUDING HIS TESTIMONY SHOWING THE BASIS OF HIS OPINION AS IT DOES IN ADMITTING IT.

Trial Court discretion is a rule designed for such necessities as achieving the most accurate possible on-the-spot evaluation of the credibility of witnesses. This rule has no applicability whatsoever to objective facts which are equally as obvious to the Appellate Courts as they are to the Trial Courts. The holding of this Court that the Trial Judge in eminent domain

proceedings has a certain area of unlimited discretion in passing on the admissibility of facts is well founded in precedent. However, none of this precedent can be sustained by reason, because no logical argument, or argument based on expediency, can justify giving the Trial Judge such discretion when it does not involve personal judgments best determined on the spot, such as credibility of witnesses and contempt of Court.

Facts stated by expert witnesses do not involve the character or credibility of the expert. The Trial Judge, as in this case, is not judging the expert; he is weighing the facts. The fact that the Trial Judge hears them first does not give him any advantage over an Appellate Court which has equal access to the facts. It is the facts which are in question, not the person stating them. Thus Trial Court discretion is not only useless, it is dangerous, and should be replaced.

III.-IX. (See above at Pages 3-4.) [pp. 15-16]

No additional arguments and authorities are stated in this Motion for Rehearing on the above points because Appellants feel that they are adequately presented in Appellants' Brief, with the exception of the reference to *Mason* v. *State* on Page 24 of Appellants' Brief, which reference should be deleted.

CONCLUSION

For the reasons stated, Appellants pray that this case be reheard, and upon rehearing the Trial Court be reversed, and the Cause remanded for Trial.

[Signature and certificate of service omitted.]

APPENDIX C

POINT OF ERROR NO. 1 OF PETITIONERS' APPLICATION FOR WRIT OF ERROR FILED IN THE SUPREME COURT OF TEXAS

Point I. In holding that the Trial Court has a certain area of unlimited discretion to exclude evidence in a condemnation case, the Court of Civil Appeals erred, in that such holding violated Defendant landowners' right to receive just compensation for their property taken by the State for a public purpose, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 17 and 19 of the Texas Constitution.

A. ***The individual's property right to receive just compensation for his condemned property is just as sacred under our constitutional system as are individual civil rights.***

Long before it began to hold that certain provisions of the Bill of Rights guaranteeing individual civil rights were incorporated by the 14th Amendment, the United States Supreme Court held that the Fifth Amendment's guarantee that the landowner must receive just compensation for his condemned property applies to the states through the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). Cf. *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed 2d 653, 657 (1964). See also *Brazos River Conservation and Reclamation District et al v. Costello, et al*, 142 S.W. 2d 414, 417 (Tex. Civ. App. 1940), Rev'd on other grds., 143 S.W. 2d 577 (Tex. 1940).

When this Court decides rules governing admissibility of comparable sales, it is not deciding mere common law evidence questions. It is deciding a constitutional right as precious to the Defendant landowners just as is the right against self-incrimination precious to the criminal defendant. The Fifth Amendment to the United States Constitution not only protects against self-incrimination, it also protects the individual against being deprived of his property for a public purpose without just compensation. The Texas Constitution guarantees the same right in Article I, Section 17.

B. *To permit a certain unlimited area of Trial Court discretion to exclude comparable sales is to destroy this constitutional right.*

Just as in criminal cases involving right to liberty, so also in eminent domain cases involving right to property, any doubts in the mind of the fact-finder must be resolved in favor of the Defendant.

Whenever a reasonable doubt exists in the mind of a Trial Judge in a criminal case that a constitutional right, such as those guaranteed by the Ffth Amendment, is being violated, the Trial Judge has limited discretion to decide the question in favor of the Government. So also in an eminent domain trail; the Trial Judge, in protecting the constitutional right of the Defendant, must have only limited discretion whenever a reasonable doubt arises in his mind concerning an evidence rule. Whenever a person is hauled into Court by the Government, which is depriving

the person of his property for public use, the landowner has the full weight of governmental power against him just as he would were he a defendant in a criminal case. For this reason, the Fifth Amendment to the United States Constitution wisely guarantees the right to the property owner to receive just compensation. The constitution does not guarantee to the State government the raw power to take advantage of the landowner through Trial Judge favors to the State under the guise of judicial discretion.

Therefore, to implement the constitutional guaranties to a defendant in an eminent domain proceeding, the Trial Judge must exercise his fact-finding power in the same way that a Jury must exercise its fact-finding power in a criminal case. In a criminal case, unless the evidence convinces beyond a reasonable doubt that the accused is guilty, he is innocent. Likewise, in an eminent domain case: unless the landowner's preferred evidence is inadmissible beyond a reasonable doubt it must be admitted.

APPENDIX D

No. A-10,903

IN THE
SUPREME COURT OF TEXAS

JULIUS BRUNER AND
WIFE, IRIS BRUNER, Petitioners,
v.
STATE OF TEXAS, Respondent.

PETITIONERS' MOTION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF TEXAS:

Julius Bruner and wife, Iris Bruner, Petitioners, respectfully move the Court to set aside its holding entered herein on October 6, 1965, which refused Petitioners' Application for Writ of Error by finding no reversible error in the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas and thereby affirmed the judgment of the County Court at Law of Tarrant County, Texas. As grounds for such rehearing, Petitioners would respectfully show the Court the following:

I.

BOTH THE CONSTITUTIONAL RIGHT TO JUST COMPENSATION AND THE PROPER FUNCTIONING OF THE ADVERSARY PROCESS ARE DENIED WHEN THE TRIAL COURT IS GIVEN AN AREA OF UNLIMITED DISCRETION

TO EXCLUDE EVIDENCE EQUAL TO ITS DISCRETION TO ADMIT IT, AND THAT THE COURT ERRED IN UPHOLDING SUCH UNLIMITED DISCRETION TO EXCLUDE EVIDENCE.

ARGUMENT AND AUTHORITIES

Petitioners respectfully urge that this Court find that the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 17 and 19 of the Texas Constitution, which guarantee the landowner just compensation for his condemned property, were not obeyed when the trial court was permitted a certain unlimited area to exclude evidence which an expert from the market place stated that he used in reaching his opinion of the market value of the condemned property. When this Court has set forth rules declaring that the standards of the market place are to govern in the courtroom in determining market value, it cannot follow that standard, nor can it obey the constitutional mandate to grant just compensation, when it prohibits an expert in the market place from sharing his expert knowledge with the jury. If there is any reasonable doubt as to the admissibility of evidence offered by the expert, then both the requirements of constitutional law and fair play in the adversary process require that the trial court exercise its judgment in favor of admitting the evidence. The opponent then has the corrective techniques of cross examination and limiting instructions from the trial court.

To exclude as a matter of law evidence of comparable sales which an expert says is relevant, leaves no room for remedy; in this case, where all such evidence

offered by the landowners was excluded, the landowners were denied their substantive right to resort to the courts for just compensation.

II.

EVEN UNDER THE RULE PERMITTING A CERTAIN UNLIMITED AREA OF TRIAL COURT DISCRETION TO EXCLUDE EVIDENCE, THE COURT ERRED IN NOT FINDING THAT PETITIONERS' 21 ACRE SALE IN 1962 WAS NOT SUFFICIENTLY COMPARABLE TO BE ADMITTED FOR ANY PURPOSE WHEN OFFERED BY AN EXPERT WITNESS.

ARGUMENT AND AUTHORITIES

The State admitted in its Reply at Page 17 that the single most important factor in determining the comparability of comparable sales offered in this case was water and sewer facilities. Petitioners respectfully again urge the Court to observe the fact that Sale No. 1, the 21-acre sale by Petitioners arranged by the Fort Worth & Denver Railroad in 1962 for $2,500.00 per acre each, excluded by the trial court, was land which was not served at the time by either municipal water or municipal sewer facilities. (Point III in Petitioners' Application) Even though a proposed private sewer plant which would cost $40,000.00, plus several thousand dollars for mains, was not in existence, still the Fort Worth & Denver Railroad and its selected grantees were willing to pay the $2,500.00 per acre asked by Petitioner Bruner.

This sale was especially relevant, because the testi-

mony concerning it came from Glenn Key, a real estate expert, who was also a party to the transaction. No reasonable prudent person in the market place would exclude this sale from his mind in deciding the value of the condemned property. In refusing Petitioners' Application because of no reversible error, the Court will be denying the jury information which any reasonable prudent man in the market place could not help but consider in deciding what price to pay or accept for the condemned property.

WHEREFORE, PREMISES CONSIDERED, Petitioners respectfully pray the Court to set aside its holding announced and delivered on October 6, 1965, and to grant Petitioners a rehearing, and upon such rehearing, to reverse the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas for the reasons set forth herein, and to remand the cause for trial, and to grant Petitioners such other and further relief to which they may be justly entitled, either in law or in equity.

[Signature omitted]

CERTIFICATE OF SERVICE

This is to certify that a copy of this Motion for Rehearing has been sent by mail this the 19th day of October, 1965, to the attorneys for Respondent, William R. Hemphill, Fred M. Talkington, and F. William Colburn, Assistant Attorneys General, Austin, Texas.

.....

Harold D. Hammett

APPENDIX E

PETITIONERS' OFFERED SALES OF COMPARABLE PROPERTY

1. Sale by Julius Bruner of approximately twenty-one acres arranged by the Fort Worth & Denver Railroad in 1962 for $2,500.00 per acre. This sale, excluded by the trial court, was offered in testimony by both Petitioner Julius Bruner and by Petitioners' expert witness Glen Key. Since Mr. Key was both an expert and personally involved in the transaction, it was also offered as direct and independent evidence.

Mr. Key's duties required him to be familiar with the subject property and the area around it. His duties were to buy industrial property with railroad extensions accessible for potential customers of the Fort Worth and Denver Railroad (S.F. 131, 132). In 1962, he and Mr. Bruner agreed that Mr. Bruner would sell the railroad approximately 21 acres for $2,500.00 per acre (S.F. 78, 80, 95-96). In order to use tax postponement provisions of the Internal Revenue Code by trading their own properties, the Railroad designated five grantees to whom Mr. Bruner conveyed five tracts composing the 21 acres, and who paid him $2,500.00 per acre cash. The grantees then later conveyed the 21 acres to the Fort Worth and Denver Railroad, as accurately described by the Court of Civil Appeals. The entire 21 acre sale is designated by the number "1" on the map in Appendix F; the five arbitrarily selected tracts composing it are designated by the numbers "2" through "6". Petitioners offered the entire 21 acre transaction as one sale, and

also offered separately the five component sales. The Court of Civil Appeals correctly regarded this as one sale as between Bruner and the five grantees.

This sale was located only about 2,300 feet west of the subject property (S.F. 83-84). Mr. Key testified that the property was comparable to the condemned property in topography and in its accessibility to the railroad extensions. He said it was "very similar" to the condemned property (S.F. 104).

The fact that the 21 acre tract was closer to existing railroad facilities than is the subject property does not render the sale not comparable. Comparable sales must be of similar property, not of exactly identical property, or the very concept of "comparable sales" could not exist. Mr. Key, who arranged the transaction for the benefit of the railroad and the railroad's potential clients, stated that the freeway did not enhance the value of the 21 acres at all (S.F. 104-106). He further stated that the 21 acres did not touch existing railroad property, but instead touched Texas Electric Service Company property located between the sale and the railroad (S.F. 90, 107-108). In order to bring railroad trackage on to the 21 acre tract, the railroad still had to bargain with Texas Electric Service Company (S.F. 108).

Mr. Key stated that the subject property was "very good industrial property" with railroad facilities available, which testimony he was permitted to give before the Jury (S.F. 133, 134). However, the Jury was not permitted to hear his testimony, or Mr. Bruner's, concerning the 21 acre sale which Mr. Key

felt was so comparable that, had the railroad had the money, he would have bought on through to the subject property (S.F. 104). Thus, the Texas rule permitted exclusion of testimony about a sale of land similar size (21 acres compared to 33 acres), similar topography, similar access to railroad, sewer and water extensions, and considered by both the seller, Mr. Bruner, and the expert party arranging the transaction, Mr. Key, as very good similar industrial property.

The Texas Court of Civil Appeals made a grievous error in finding that all of the Petitioners' offered sales had all or some necessary utilities, or the prospect of attaining them at an earlier time than did the condemned property. This finding is especially erroneous concerning sale No. 1. No evidence exists anywhere in the record to support such finding. Indeed, the Forth Worth and Denver Railroad, and its selected grantees, were willing to pay the $2,500.00 per acre asked by Petitioner Bruner even though a proposed sewage treatment plant for 50 acres in the southwest corner of Bruner's property encompassing the 21 acre transaction had not been constructed (S.F. 141-143).

Each of the following sales, numbered 2 - 6, was offered by either or both of Petitioners' expert witnesses, M. R. Carb, Jr., and L. G. (Glen) Key, to show the basis of their expert opinions as to the market value of the condemned property. All were excluded. Their locations can be seen on the map in Appendix F.

2. Railroad to General Mills. Sale No. 7 was by the Fort Worth and Denver Railroad to General Mills in

1956. The land contained 10.41 acres of which approximately 400 feet fronted on the north side of Terminal Road and extended northward by about 1,000 feet (S.F. 119). Thus this tract was immediately west of the southwest corner of the subject property and approximately 4,400 feet from it (Appendix F). Although closer to existing railroad trackage than was the condemned property at the time of condemnation, the General Mills sale did not touch railroad extensions at the time of the sale. (S.F. 120, 163-164). Railroad trackage was made available later to the tract from its north end (S.F. 120). This sale was offered by both Petitioners' experts, Key (S.F. 119, 128) and Carb (S.F. 162, 167).

Even though the sale occurred seven years prior to the date of condemnation, Mr. Carb testified that its price was a good indication of what an established business would pay for an industrial site, and that it would be far more valuable now than what it sold for in 1956, $2,480.00 per acre cash (S.F. 119, [Key], 124, 166). He further testified that the reason why it was more valuable now is because there has been an upward trend in property values in the area near the General Mills tract and in the area near Petitioners' condemned property (S.F. 167).

3. Salam to Brockman. Sale No. 10, from Salam to Brockman, occurred on January 11, 1963, slightly over two months before the date of condemnation, March 20, 1963. The 18.13 acre Salam sale is located at the corner of 36th Street and Sylvania (S.F. 170, 174), thus lying approximately 2,800 feet southeast

of the southern tip of the subject property (S.F. 170-173). The land did not touch railroad trackage (S.F. 171). The total sales price, $75,000.00, included the price of a small brick veneer building located on the tract. Its size was about 30 feet x 60 feet; it was in very poor condition. Mr. Carb testified that the real estate agent involved in the sale estimated the value of the building from $10,000.00 to $12,000.00, and the Seller verified that the Purchasers estimated the value of the building as $12,000.00 (S.F. 171).

Mr. Carb took the price of the improvements into consideration in using this sale as a sale of comparable property because it is located close to the subject property, because it is located in the same industrial area, and because it was accessible to railroad tracks but not touching them. The usual elements showing that the tract was not identical in all respects, but comparable only, were indicated by Carb's testimony that the land was better than the subject property because it is closer to more industrial development, but it is worse because of its triangular shape (S.F. 172-173, 178).

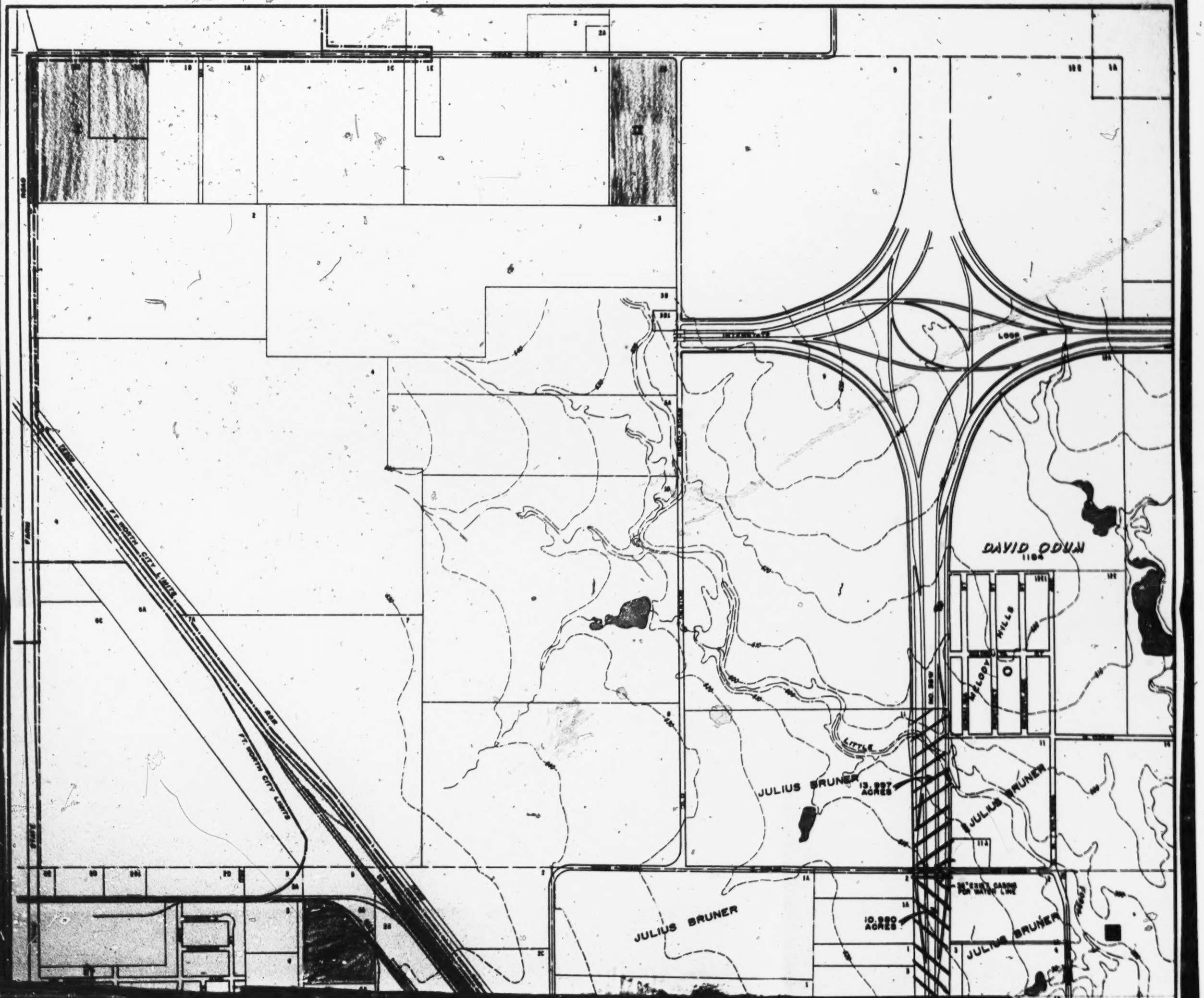
4. Railroad to Miley Trailer. Sale No. 11 occurred on November 8, 1963 by the Fort Worth and Denver Railroad to Miley Trailer Employees Trust of 3.948 acres for $3,485.00 per acre (S.F. 179-180). It was considered to be comparable by both Key (S.F. 122-123) and Carb (S.F. 179-186). There were no improvements on the land at the time of sale; it did not touch any railroad (S.F. 180). The tract was located west of the southern section of the condemned prop-

erty. Three pieces of property separated it from Deen Road, which is the western boundary of Petitioner Bruner's property (S.F. 180). The property sold was approximately one and one-half blocks west of the west side of Mr. Bruner's property (S.F. 181), thus about 3,000 feet or approximately three-fifths of a mile (S.F. 184-185) from the condemned property. It contained 517 feet of frontage on Terminal Road (S.F. 183). Carb testified that the tract was comparable to Petitioners' condemned property because it had railroad trackage available, because it had utilities available, and because of its close proximity to the southern portion of Mr. Bruner's tract from which part of the subject property was taken (S.F. 181).

Although the land was sold in a transaction arranged by the railroad (S.F. 182-183), the Miley Trailer Employees Trust actually paid Three Thousand Four Hundred Eighty-Five Dollars ($3,485.00) per acre (S.F. 183) for it.

5. Skrasek to American Manufacturing Company. Sale No. 9 was arranged in 1958 or 1959 by and for the Forth Worth and Denver Railroad from John Skrasek to the American Manufacturing Co., and contained approximately 15 acres for $1,500.00 per acre. This sale is located on North Sylvania Avenue approximately 5600 feet southeast of the southeast corner of the subject property. Petitioners' expert, L. G. Key, testified that this tract was industrial property similar in character to the subject property (S.F. 125). In fact, it is somewhat less desirable than the subject property, because a part of it was subject to water overflow.

6. Skrasek to Railroad. Sale No. 8 was a 1958 sale by John Skrasek and wife to the Fort Worth and Denver Railroad of approximately 14 acres for $1,800.00 per acre. Petitioners' expert witness, L. G. Key, was personally involved in this transaction and offered it as a comparable sale (S.F. 123-124). The land sold is located approximately 5500 feet west of the subject property.


FT. WORTH CITY LIMITS
FT. WORTH CITY LIMITS
INTERSTATE
LOOP
DAVID ODUM
1184
McCLOUD HILLS
LITTLE
JULIUS BRUNER
13.227 ACRES
JULIUS BRUNER
JULIUS BRUNER
10.280 ACRES
JULIUS BRUNER

LEGEND —

I MARY O. PITTENGER SLAWSON TO J.D. & DALLAS VANN - 40 AC. (9418')
II BERNEICE CROWDER PITTENGER TO EDWIN W. RITCHEY - 25 AC. (5718')

A FT. WORTH & DENVER RY. CO. TRACKS & SWITCHING YARDS
B COTTON BELT ROUTE TRACKS
C TEXAS & PACIFIC RY. CO. TRACKS
D SOUTHWESTERN PETROLEUM CORP.
E STAUFFER CHEMICAL CO. (CONSOLIDATED CHEMICAL DIV.)
F INTERNATIONAL MINERALS & CHEMICAL CORP.
G INTERSTATE GRAIN CORP.
H NUTRENA MILLS FEED MANUFACTURING CO.
I FORM-FORGE INC.
J HOUSES ACROSS BEEN RD. FROM INTERN'L MIN. & CHEM. CORP.
K MAGNOLIA PETROLEUM CO. TRACT
L AMERICAN MANUFACTURING CO. OF TEXAS
M SIL FLO CORPORATION
N RAY STEEL CO. INC.
O MELODY HILLS HOUSES
P TEXAS ELECTRIC SERVICE CO. RIGHT-OF-WAY

1 21.291 AC. TRACT ARRANGED BY F.W. & D. RY. WITH JULIUS BRUNER (2360')
2 J. BRUNER TO WILSON GRAIN OF LUBBOCK INC. - 8.908 AC.
3 J. BRUNER TO MILEY TRAILER EMPLOYEES TRUST - 5.603 AC.
4 J. BRUNER TO BASS SOAP CO., ABILENE, TEX. - 1.2 AC.
5 J. BRUNER TO LONE STAR COTTON CO. OF LUBBOCK - 4.373 AC.
6 J. BRUNER TO LONE STAR WAREHOUSE, INC. - 1.4 AC.
7 F.W. & D. RY. TO GENERAL MILLS, INC. - 10.41 AC. (4480')
8 JOHN SKRABEK TO F.W. & D. RY. - 11.3756 AC. (5850')
9 JOHN SKRABEK, ARRANGED BY F.W. & D. RY. - 11.2 AC. (5875')
10 HENRY SALEM TO MALCOLM BRACKMAN, TRUSTEE - 18.13 AC. (2260' & 2715')
11 F.W. & D. RY. TO MILEY TRAILER EMPLOYEES TRUST - 3.948 AC. (4975')

LITTLE POSSE APPROVED SANITARY SEWER PROJECT

1 21.281 AC. TRACT ARRANGED BY F.W. & D. RY. WITH JULIUS BRUNER (2360')
2 J. BRUNER TO WILSON GRAIN OF LUBBOCK INC. - 8.808 AC.
3 J. BRUNER TO MILEY TRAILER EMPLOYEES TRUST - 8.808 AC.
4 J. BRUNER TO SASS SOAP CO., ABILENE, TEX. - 1.8 AC.
5 J. BRUNER TO LONE STAR COTTON CO. OF LUBBOCK - 4.373 AC.
6 J. BRUNER TO LONE STAR WAREHOUSE, INC. - 1.4 AC.
7 F.W. & D. RY. TO GENERAL MILLS, INC. - 10.41 AC. (4460')
8 JOHN SKRABEK TO F.W. & D. RY. - 11.8756 AC. (5550')
9 JOHN SKRABEK, ARRANGED BY F.W. & D. RY. - 11.2 AC. (5575')
10 HENRY SALEM TO MALCOLM BRACHMAN, TRUSTEE - 18.13 AC. (2260' & 2715')
11 F.W. & D. RY. TO MILEY TRAILER EMPLOYEES TRUST - 3.948 AC. (4975')

LITTLE FOSSIL APPROVED SANITARY SEWER PROJECT

MUNICIPAL WATER & SAN. SEWER FROM SUBJECT PROPERTY

NOTE — ALL DIMENSIONS SHOWN IN PARENTHESIS ( ) IN THE ABOVE LEGEND ARE SCALED FROM NEAREST POINT OF SUBJECT PROPERTY TO NEAREST POINT OF PROPERTY DELINEATED.

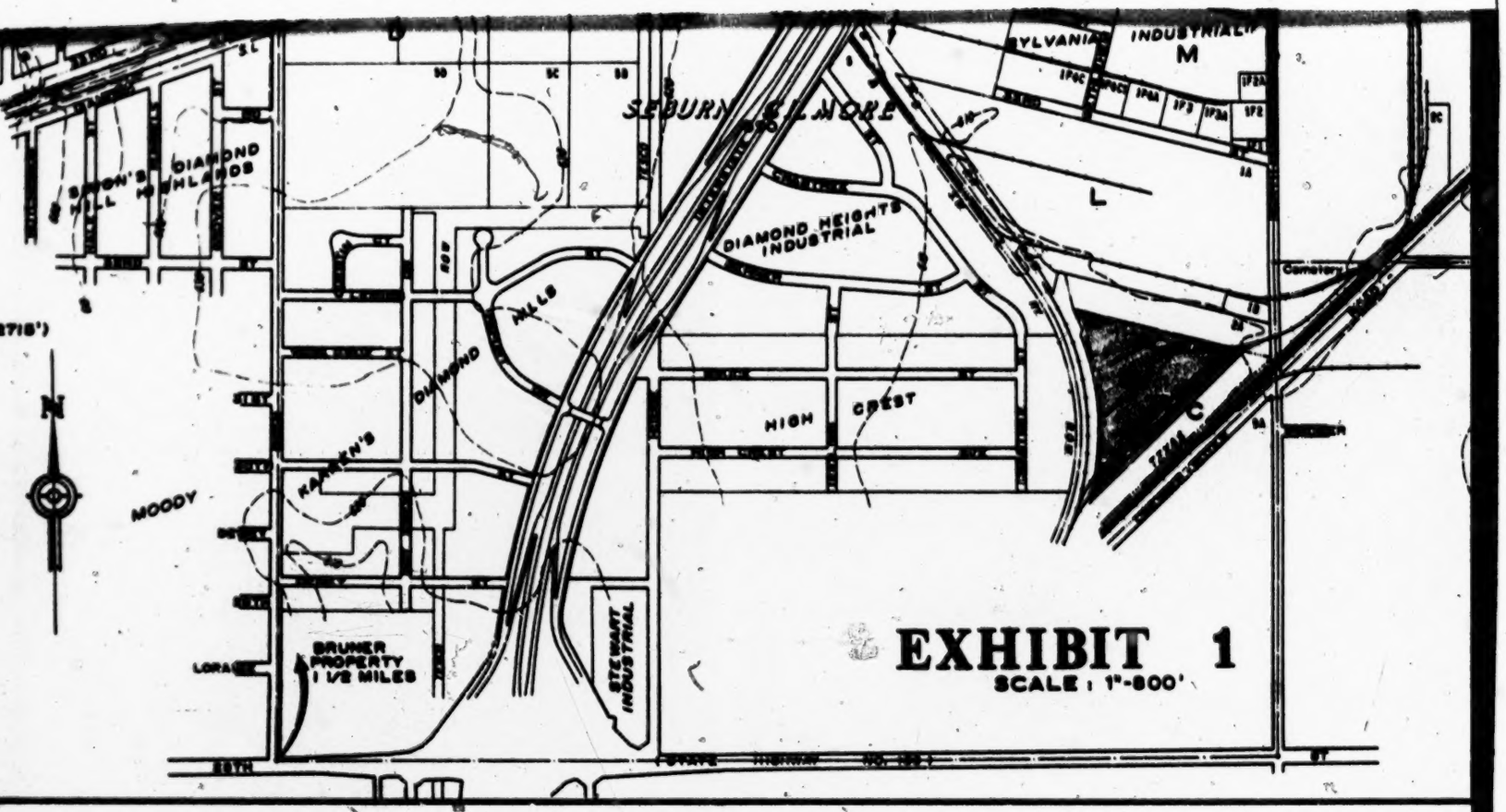


EXHIBIT 1
SCALE : 1"-800'

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NO. 972

IN THE

SUPREME COURT OF THE UNITED STATES

JULIUS BRUNER AND WIFE, IRIS BRUNER,

Petitioners

V.

THE STATE OF TEXAS,

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes Respondent, the State of Texas, and respectfully files this Brief in Opposition to the Application for Writ of Certiorari.

JURISDICTION

Respondent respectfully suggests that this Honorable Court is without jurisdiction in this case and that no Constitutional question is properly presented to this Court for adjudication.

Petitioners correctly state that the federal questions they urge for review were first raised in Point of Error I in their Motion for Rehearing in the Texas Court of Civil Appeals. However, the Statement that this was the first opportunity to raise such questions is

not correct. They failed to bring any constitutional question to the attention of the trial court at the time the complained of rulings were made. They also failed to specify such questions as grounds of error in their original Motion for New Trial and in their Amended Motion for New Trial, both of which were filed by Petitioners pursuant to the requirements of the Texas practice. Tex. Rules Civ. Proc. Rules 324 and 329b. Failing this, such grounds could not be considered by the trial court and were waived. Tex. Rules Civ. Proc. Rule 320. (Each of the above mentioned rules are quoted in the appendix to this brief beginning at page A-1.)

The Texas Rules of Civil Procedure further provide that a ground of error not distinctly set forth in the Motion for New Trial is to be considered as waived in the Texas Court of Civil Appeals. Tex. Rules Civ. Proc. Rule 374 (quoted in full at Page A-5); *Dallas Railway & Terminal Co. v. Bailey,* 151 Tex. 359, 250 S.W.2d 379 (1952).

Furthermore, under Rule 469 of the Texas Rules of Civil Procedure (quoted in full at Page A-6), no point of error in Petitioner's Application for Writ of Error to the Supreme Court of Texas not germane to some assignment of error in the Motion for New Trial in the trial court can be considered. *Harris v. Windsor,* 156 Tex. 324, 294 S.W.2d 798 (1956).

Petitioners have failed to demonstrate that this Honorable Court has jurisdiction under Title 28, U.S.C. §1257 in two particulars. First, it does not appear that either the Supreme Court of Texas or the Texas Court of Civil Appeals had properly presented for their consideration the claimed constitutional questions, hence

there is no "Final judgment or decree . . ." by either court on such questions to be reviewed. *Bailey v. Anderson,* 326 U.S. 203 (1945). It also does not appear that the asserted constitutional right was ". . . set up or claimed . . ." in the proper court below, and hence the judgment of the highest State Court is conclusive. *Jacobi v. Alabama,* 187 U.S. 133 (1902); *Mutual Life Insurance Co. v. McGrew,* 188 U.S. 291 (1903).

QUESTIONS PRESENTED

Petitioners have alleged that two questions are presented by this application, stating their first question as follows:

"1. Can a state force the Defendant in a condemnation case to prove that his evidence is admissable [sic] beyond a reasonable doubt before he can present it to the jury?"

Respondent will show that this question neither states the letter nor the effect of the opinion of the Texas Court of Civil Appeals in this case. On the contrary, the holding in this case recognizes the Texas rule of admissibility of comparable sales to be a matter largely within the discretion of the trial court, which rule is followed in the majority of jurisdictions in this country and indeed, in the Federal Courts.

Petitioners state their second questions as follows:

"2. Does any adequate State ground exist to justify giving the State courts any power to exclude admissible evidence?"

Respondent will show that there is no factual basis for such a question. It is purely rhetorical. At no point in its opinion did the Texas Court of Civil Appeals

hold that the excluded comparable sales were admissible. A considerable portion of its opinion is devoted to pointing out the many dissimilarities between the five excluded sales offered by Petitioners' and the property being condemned. This discussion precedes, in the written opinion of the Court, its holding that no abuse of discretion on the part of the trial court had been shown.

STATEMENT OF THE CASE

Respondent believes that additional facts from the record of this case other than those related in the Petition, would be helpful to a full understanding of the trial court's rulings.

By stipulation of all parties prior to the introduction of any evidence in the trial court, damages to Petitioners' property not being condemned were waived and the only issue to be decided was the market value of the land actually condemned (S. F. 3). It is believed that this circumstance is a strong indication that any sale of a portion of Petitioners' remainder, subsequent to the date of taking reflects an enhancement brought about by the knowledge of the location of the new interstate highway.

Petitioners originally owned 439 acres of raw, undeveloped land, which had been purchased in 1948 (S. F. 10). At the date of taking no development had taken place on the property other than approximately 2.75 acres at the northeast corner of the new right-of-way herein involved and Odom Road on which was located a church and pastor's residence (S. F. 25). This had been conveyed by Petitioners in 1960 for such use (S. F. 26, 66).

As shown by Defendant's Exhibit No. 1, the subject property is immediately north of the Fort Worth city limits, west of Saginaw and east of Haltom City. It is not within any city (S. F. 22-24). The property is bounded on the east by Sylvania Road, on the west by Old Denton Road (also known as Deen Road), on the south by two large tracts of undeveloped land (S. F. 33), and on the north by a residential subdivision, Melody Hills, and another large, undeveloped tract of land (S. F. 24-29).

The property is generally in an area to the north and west of the Cotton Belt Railway tracks and north and east of the Fort Worth and Denver or Burlington tracks (DX-1). These tracks intersect generally south of Appellant's property (DX-1).

During the course of the trial a sharp issue was drawn concerning the drainage of the subject tract, and the availability of sewage (S. F. 31-40). Petitioner Bruner testified that a small tract in the corner of the south side of his property would drain by gravity flow to the south and into the Marine Creek drainage area and into the sewer connection already in place (S. F. 42). This tract is that 21 acre portion in the southwest corner conveyed subsequent to the taking by Petitioner Bruner to other parties (S. F. 104). Petitioners' witness Key testified out of the presence of the jury, that the 21 acre portion conveyed by Bruner sits on approximately the highest point of his ownership (S. F. 104).

The property being valued by the jury drains into the Little Fossil Creek drainage area (S. F. 142). The land to the south and west of Petitioners' property, and across the railroad tracks from it, is in the city of Fort Worth, drains to the south and is served by

the city sewage lines. The closest points these lines come to Petitioners' property were indicated on Defendant's Exhibit 1 by Bruner himself (S. F. 34 and 41).

Petitioners offered an expert engineering witness, and are bound by his testimony, James B. Miller, who is employed by the City of Fort Worth. He testified that the land being taken is in the Little Fossil Creek drainage area and that he had studied the most expedient way to provide sewer service for the 33.881 acres being taken in this case (S. F. 142). The most expedient way would be the installation of a package treatment plant, which would afford the opportunity of extending main service from such plant on Fossil Creek to whatever portion of the property desired to serve (S. F. 142). The land being taken could be served by the plant (S. F. 142). The plant would be built by the developer (S. F. 142-143), the number of acres to be served would depend on the size plant and they had discussed a plant that would serve 50 acres and cost $40,000.00 (S. F. 143). It would cost the developer another $30,000.00 to get the mains to the border of the tract (S. F. 143-144).

Petitioners' witness further testified that he had checked into what would be necessary to provide water service for the same 50 acres (S. F. 145). It would cost $7,500.00 to extend water service to the southwest corner of the whole tract and another $20,000.00 to extend it 3,200 feet more to the property in question (S. F. 145).

This evidence, offered by Petitioners, and undisputed in the record, shows it would cost approximately $97,500.00 to make water and sewage available to a 50 acre tract of which the 33.881 acre strip being taken is a part.

Although Petitioners stated that municipal sewage facilities come within 3,200 feet of the subject property, the record shows that no such facilities can feasibly be extended from the present location over the ridge, or over the 640 foot contour, down into the Little Fossil Creek drainage area so as to serve the 33.881 acres being taken. On the contrary, special facilities costing $70,000.00 would have to be provided by the developer to bring sewage mains *to the border of the tract* (S. F. 143).

The City of Fort Worth has constructed additional sewer lines at two points on the subject property. However, they were built under the new interstate highway *to tie in with future plans,* not connected at the present, but to prevent tearing up the highway after construction (S. F. 324-326).

It should also be noticed that the property being taken by the jury is 3,300 feet from the Rock Island Railroad at its nearest point (PX-1). There is no evidence in the record as to how much it would cost to bring tracks over that distance to the subject property in order to give it the trackage that already abuts Petitioners' claimed comparable sales.

ARGUMENT AND AUTHORITIES

QUESTION NO. 1

The Texas Court of Civil Appeals in this case correctly stated the Texas rule that a discretion is lodged in the trial court relative to whether evidence tendered purporting to show sales of comparable property to that condemned shall or shall not be admitted. *Chaney v. Coleman,* 77 Tex. 100, 13 S.W. 850 (1890) at 13 S.W.

851 and *State v. Oakley,* 163 Tex. 463, 356 S.W.2d 909 (1962) at 356 S.W.2d 914. This rule, sometimes referred to as the "Massachusetts" rule, prevails in the majority of American jurisdictions. See Annotation, 118 A.L.R. 869 at page 904 (1939). In fact, by their insistance that the rule granting such discretion to the trial court violates their constitutional rights, Petitioners ask this Court to impose more stringent restrictions upon a Texas trial court than are placed on the Federal trial courts. It has been consistently held that the matter of the range of inquiry allowed as to comparable sales in an eminent domain case is to a considerable extent within the discretion of the trial judge. *Foster v. United States,* 145 F.2d 873 (C.C.A. 8th 1944); *United States v. Block,* 160 F.2d 604 (C.C.A. 9th 1947); *Stephens v. United States,* 235 F.2d 467 (C.C.A. 5th 1956).

The holding of the Texas Court of Civil Appeals in this case differs in no regard from the effect of any situation where the trial court is granted discretionary power in admitting and excluding evidence. The given area may be divided into three general categories. On the one hand the proffered evidence may be held to be admissible as a matter of law, and the trial judge guilty of a clear abuse of discretion if he excludes it. On the other hand the proffered evidence may be held to be inadmissible, also as a matter of law, and the trial judge guilty of an abuse of discretion should he admit it. In between these two extremes is the area wherein the oft-quoted term, sound judicial discretion, comes into play. In this area, as the Texas Court of Civil Appeals ruled, the trial judge cannot be held guilty of an abuse of discretion whichever way he might rule. This last is the area where reasonable minds might

differ and where the Appellate Court properly refuses to substitute its judgment for that of the trial court. *International Paper Company v. United States*, 227 F.2d 201 (C.C.A. 5th 1955).

Before it ruled that the trial court in this case did not abuse its discretion in excluding the purported comparable sales, the Texas Court of Civil Appeals outlined some of the factors which might be used to test the comparability of the proffered sales to Petitioners' property and which showed the marked dissimilarities:

> "Such 21 acre tract and the other four tracts as to which the condemnees tendered evidence as comparable sales, or sales of comparable property, in support of the witnesses' stated opinion on the market value of the land condemned, were either adjacent or near-adjacent to existing railroad trackage. The condemned property was over a quarter of a mile removed therefrom. Part of it was at a considerably greater distance. Testimony from an agent of the railroad company, however, was to the effect that trackage would be made available to said portion of condemnees' total acreage as and when it might be developed industrially. The same thing applied to all of condemnees' property. There was no issue made, but the evidence undisputably established that the highest and best use of all of the condemnees' property, including that taken, was for industrial development. As of the date condemnees' land was taken lack of convenient availability of water, sewer and gas hampered its development as such. It was shown that the condition will be remedied in the not too distant future. All the tracts as to which condemnees tendered evidence as comparable property either have some or all such utilities, or will probably have such at an earlier time than that condemned.

> It was established by the evidence that a considerable sum would be necessary to be expended in order to have such services extended to said area. All such as presently exist lie south of the nearest trackage." *Bruner v. State,* 391 S.W.2d at page 154.

It is submitted that the factors above support the trial court's ruling in this case. Reference to Respondent's Statement of the Case at the beginning of this brief will show what those factors of dissimilarity mean in terms of comparing the market value of the offered sales to Petitioners' land.

Petitioners' preoccupation with the fact that the sales offered by the State of Texas in this case, and admitted by the trial judge, were further removed from Petitioners' property than their offered sales, which were excluded, is believed of little significance. In terms of city sewage, utilities and railroad trackage available and size, they were more comparable to Petitioners' property than the excluded sales.

> "The character of such land situated several miles from land condemned may well be more comparable than that within a few hundred feet. This is a question to be decided in the first instance and in his discretion by the trial court." *Knollman v. United States,* 214 F.2d 106 at page 109 (C.C.A. 6th 1954).

Petitioners have the constitutional right to just compensation when their property is taken by the State under the power of eminent domain, which they received in the court below. In Texas, unlike some other jurisdictions including the Federal system, when property is being condemned by the United States, Petitioners have the constitutional right to a jury trial, which

they also received below. However, Petitioners have cited no authority to this court, and it is believed none exists, granting to them the constitutional right to introduce in that jury trial all evidence offered by them without regard to tested rules of admissibility. It is submitted that no question is presented in this case that Petitioners were forced to prove that their evidence was admissible beyond a reasonable doubt. What they failed to show was that the trial court abused its discretion in excluding Petitioners' sales. No constitutional issue of substance is presented by Petitioners' first question.

QUESTION NO. 2

Petitioners' second question poses a purely rhetorical issue without basis in fact as applied to their case. The Texas Court of Civil Appeals did not assume any *power to exclude admissible evidence.* It held that no ground existed for overturning the holding of the trial court that the proffered evidence was inadmissible.

As is pointed out in the discussion under Question No. 1, above, the Texas Appellate Court first pointed out the many features of dissimilarity between the sales offered by Petitioners and then held that this evidence fell within the area of sound judicial discretion. The Texas Court of Civil Appeals properly chose not to substitute its judgment in the matter for that of the trial court. *International Paper Company v. United States,* 227 F.2d 201 (C.C.A. 5th 1955). The Texas Court obviously viewed the question in much the same light as did the United States Court of Appeals for the Fifth Circuit in a similar situation.

". . . To facilitate the ultimate inquiry of fair market value of a landowner's property at the date of taking, we think some reasonable latitude and discretion in the acceptance or rejection of all such testimony must of necessity be allowed the commission and district court, especially where, as here, much of the evidence admitted was not so remote or immaterial upon that issue as to require its exclusion without objection, and that excluded was not so clearly admissible as would show prejudice and warrant a redetermination." *Stephens v. United States,* 235 F.2d 467 at page 471 (C.C.A. 5th 1956).

The only item of evidence excluded by the trial court and held to be admissible by the Texas Court of Civil Appeals was the opinion of value of Petitioners' witness L. G. Key. This was held to be error, but not reversible under the Texas "Harmless Error" rule, which provides in part:

". . . that a judgment shall not be reversed on appeal and a new trial ordered because of an error of law on the part of the trial court unless the Appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the Appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, . . ." Tex. Rules Civ. Proc. Rule 434. (quoted fully at Page A-5).

The Texas Court of Civil Appeals pointed out that Petitioner Bruner and two other expert witnesses had testified as to value on behalf of Petitioners. Petitioner Bruner testified to a value of $3,000.00 per acre (S.F. 52). Petitioners' witnesses Carb and Wade, testified to values of $2,500.00, $2,000.00 and $1,500.00 per acre

for respective portions of the land being taken (S.F. 152-153 and 315, respectively). The witness Key's opinion, shown by bill of exception to be $2,500.00 per acre (S.F. 115), would have been higher than Petitioners' expert witnesses and lower than the opinion of the Petitioner Bruner himself. As such it would have been merely cumulative and clearly fell within the scope of Tex. Rules Civ. Proc. Rule 434, noted above.

It is submitted that no violation of Petitioners' constitutional rights is shown under the purely abstract proposition contained in their second question.

CONCLUSION

For the reasons set out above it is respectfully submitted that Petitioners have failed to demonstrate that this Honorable Court has jurisdiction in this cause. It is further submitted that Petitioners do not present any Federal question of substance and neither do they demonstrate any violation of their constitutional rights in the rulings of the trial court and the Texas Court of Civil Appeals below. Respondent respectfully prays that the Application for Writ of Certiorari be denied.

Respectfully submitted,

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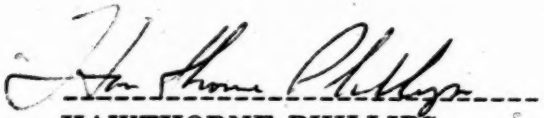

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ATTORNEYS FOR RESPONDENT,
THE STATE OF TEXAS

CERTIFICATE OF SERVICE

I, Hawthorne Phillips, Assistant Attorney General of Texas, am a member of the Bar of the Supreme Court of the United States, and I do now enter my appearance in the Supreme Court of the United States in the above captioned cause, in behalf of Respondent; I do further certify that copies of the foregoing brief have been forwarded by United States Mail, First Class, Postage Prepaid, to Heard L. Floore, 1401 West Lancaster, Fort Worth, Texas 76102 and Harold D. Hammett, Simon and Simon, 816 First National Bank Building, Fort Worth, Texas 76102, attorneys for Petitioners.

Hawthorne Phillips

HAWTHORNE PHILLIPS
Assistant Attorney General
of Texas

APPLICABLE TEXAS RULES OF CIVIL PROCEDURE

Rule 320. Motion

"New trials may be granted and judgment set aside on motion for good cause, on such terms as the court shall direct. Each such motion shall be in writing and signed by the party or his attorney and shall specify each ground on which it is founded, and no ground not specified shall be considered. As amended by order of July 20, 1954, effective Jan. 1, 1955."

Rule 324. Prerequisites of Appeal

"In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as a prerequisite to appeal; provided that neither a motion for new trial nor an assignment therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a peremptory instruction, or in withdrawing the case from the jury and rendering judgment, or in rendering or refusing to render judgment non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, or in overruling a motion for judgment on the verdict made by the party who becomes appellant; nor shall a motion for new trial be required in a non-jury case or in a case where the appeal is based upon some error of the trial court arising after its action upon the motion for new trial. But motion for new trial shall be a necessary prerequisite to consideration of the complaints mentioned in Rule 325. When judgment is rendered non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, the appellee may bring forward by cross-point contained in his

brief filed in the Court of Civil Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been entered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel. In the event appellee assigns error by cross-point based upon an alleged improper argument of counsel, he shall support the same by proper bill of exceptions. The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof, save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the cause. A motion for new trial shall not be necessary in behalf of appellee where he does not complain of the judgment or a part thereof. As amended by order of March 19, 1957, effective Sept. 1, 1957; April 12, 1962, effective Sept. 1, 1962."

Rule 329b. District and County Court Cases

"The following rules shall be applicable to motions for new trial filed in all district and county courts:

1. A motion for new trial when required shall be filed within ten (10) days after the judgment or other order complained of is rendered.

2. An original motion for new trial filed within said (10) day period may be amended by leave of the court. Said amended motion shall be filed before the original motion is acted upon and within twenty (20) days after the original motion for

new trial is filed. Not more than one amended motion for new trial may be filed.

3. All motions and amended motions for new trial must be determined within not exceeding forty-five (45) days after the original or amended motion is filed, unless by one or more successive written agreements of the parties in the case filed with the clerk of the court the decision of the motion is postponed to a day certain specifically set out in any such agreement. Any such day certain shall not be more than ninety (90) days after such original or amended motion is filed.

4. It shall be the duty of the proponent of an original or amended motion for new trial to present the same to the court within thirty (30) days after the same is filed. However, at the discretion of the judge, an original motion or amended motion for new trial may be presented or hearing thereon completed after such thirty (30) day period. Such delayed hearing shall not operate to extend the time within which the original or amended motion must be determined, unless such time be extended by agrement as provided for in the preceding subdivision of this Rule. In the event an original motion or amended motion for new trial be not presented within thirty (30) days after the date of the filing thereof, and the judge in his discretion refuses to consider the same or refuses to hear evidence relating thereto, such motion will be overruled by operation of law forty-five (45) days after the same is filed, unless disposed of by an order rendered on or before said date. In the event the decision of the motion is postponed by any written agreement as provided in subdivision 3 of this Rule then any such original or amended motion, if not determined by the court, will be overruled by operation of law ninety (90) days after the same is filed or on the latest day certain agreed upon, whichever occurs first.

5. Judgments shall become final after the expiration of thirty (30) days after the date of rendition of judgment or order overruling an original or amended motion for new trial. After the expiration of thirty (30) days from the date the judgment is rendered or motion for new trial overruled, the judgment cannot be set aside except by bill of review for sufficient cause, filed within the time allowed by law. The failure of a party to file a motion for new trial within the ten (10) day period prescribed in subdivision (1) of this rule shall not deprive the court of jurisdiction to set aside a judgment rendered by it, provided such action be taken within thirty (30) days after the judgment is rendered. The filing of a motion for new trial after ten (10) days have expired and before thirty (30) days have expired since the rendition of the judgment shall not operate to extend the court's jurisdiction over the judgment for a period of more than thirty days from the date of the rendition of judgment.

6. In district courts and in county courts having continuous terms, that is, successive terms in a county throughout the year, without more than two days intervening between any such terms, the following rules shall apply:

(a) A motion for new trial filed during one term of court may be heard and acted upon at the next term of court.

(b) No motion for new trial shall be considered as waived or overruled because not acted upon at the term of court at which it was filed, but may be acted upon at any time within the next term of court agreeable to the provisions of this Rule 329b.

(c) Judgments of such courts shall become as final after the expiration of thirty (30) days after the date of judgment or after a motion for new

trial is overruled as if the term of court had expired.

(7) In county courts which do not have continuous terms as defined above, the same rules shall apply except that whenever the last day of any period of time specified in this Rule 329b shall fall on a day when such a court is in vacation, such period shall run to the fifth day of the next term. Promulgated by order of July 20, 1954, effective Jan. 1, 1955; and as amended by order of July 26, 1960, effective Jan. 1, 1961."

Rule 374. Assignment of Error

"The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary. Amended by Order of March 31, 1941."

Rule 434. If Judgment Reversed

"When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any

cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonable calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appear to the court that the error affects a part only of the matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed is if such erroneous action or failure to act had not occurred. Amended by Order of March 31, 1941."

Rule 469. Requisites of Application

"The fact that the docket of the Supreme Court is overcrowded makes its imperative that applications for writs of error be as brief as possible. The attorneys are urged to co-operate with the Court in this respect, in order to reduce the work of the Court. The respondent is urged to file a reply.

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Statement of the Case. The opinion of the Court of Civil Appeals will always be read before the application is considered; consequently the application should not contain matter that is found in the opinion of the Court of Civil Appeals. Ordinarily it should contain only a statement of the general nature of the suit,—for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of Civil Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(b) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the Court depends on a conflict of decisions under Subdivision 2 of Article 1728, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." Where jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for re-

hearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the statement there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

(d) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Civil Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(e) Subject Index. The application shall contain at the front thereof a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged, together with reference to the pages of the application where the same are cited.

(f) If any brief or application for writ of error is unnecessarily lengthy or not prepared in conformity with these rules, the court may require same to be redrawn. As amended by order of April 12, 1962, effective Sept. 1, 1962."